2369

Supreme Court of the United States.

October Term, 1902.

No. 203.

R. M. HENNESSY AND OTHERS,
Appellants,
vs.
RICHARDSON DRUG COMPANY,
Appellee.

BRIEF FOR APPELLEE.

CHARLES F. TUTTLE,
Solicitor for Appellee.

This proceeding is an appeal from a Circuit Court of the United States to this court.

A preliminary question is, whether this court will entertain the invitation of appellants to decide the questions presented in their statement of errors and brief, because of their failure to properly present, for consideration here, any SINGLE, PRECISE, CONTROLLING question of jurisdiction. No SPECIFIC question of jurisdiction is DEFINED or INDICATED in the record. To specify, to define, to indicate such questions *in the briefs* of the complaining parties does not supply the silence of the record in that jurisdictional particular.

It will be observed that appellants' assignment of

errors filed in the trial court is in these words: "In dismissing complainants' bill for want of jurisdiction." (P. 19).

This assignment does not present any definite specific question of jurisdiction. In passing, it may be remarked, that the decree did not dismiss complainants' bill "for want of jurisdiction." The original decree entered in the Circuit Court was dated August 3rd, 1901, and contains no reference to any jurisdictional question; the decree is in these words: "The parties by their attorneys come and submit this cause to the court on the pleadings and EVIDENCE; and upon due consideration thereof the court finds that complainants' bill as amended should be dismissed at complainants' costs."

It is clear that the assignment of errors aided by the original decree does not present ANY question of jurisdiction.

Appellants then filed in the Circuit Court their petition of allowance of appeal in which is stated: "The above entitled complainants conceiving themselves aggrieved by a decree of dismissal made and entered on the 3rd day of August, 1901, whereby it was adjudged and decreed that complainants' bill filed in said cause be dismissed for want of jurisdiction."

It will be noticed that the decree contains no reference to a dismissal "for want of jurisdiction." The only reference to jurisdiction is injected into the record by appellants' petition of allowance of appeal, and even in that paper appellants do not set forth ANY SPECIFIC QUESTION OF JURISDICTION;—only the embracive phrase "FOR WANT OF JURISDICTION";—as broad as the laws defining the jurisdiction of the Circuit Courts of the

United States and the many decisions of this court relating thereto.

Though the evidence and the merits of the cause had been fully heard and determined in the court *a quo* and the bill dismissed GENERALLY, appellants still insisted that the Circuit Court GROUND its decree upon want of jurisdiction, and so on October 5, 1901, they procured a second decree. (P. 20). That decree shows that the Circuit Court was still unwilling to accede to complainants' wishes and base the dismissal of the bill on the SOLE GROUND of WANT OF JURISDICTION.

Still insisting against the record that their bill had been dismissed for WANT OF JURISDICTION and, without stating in what particular the want of jurisdiction appeared, an order was entered, on the motion of complainants, allowing an appeal to this court. It will be observed that the Circuit Court in making the order was careful to insert therein the statement that the order was entered on the MOTION OF COMPLAINANTS' SOLICITOR and to also insert a direction that the TESTIMONY and ALL PROCEEDINGS HEREIN be transmitted to this court. (P. 21).

The same unwillingness on the part of the Circuit Court to base its decree upon any SINGLE principle of law or question of fact is apparent in what appellants term "the certificate." That paper on its face shows that jurisdictional questions were not of CONTROLLING FORCE in the dismissal of the bill and that the trial court did not desire to and WOULD NOT certify to this court the many questions of jurisdiction arising and incidentally PASSED UPON by that court on a full and complete hearing and submission of the cause on the evidence and merits. The language of the order is

as follows: "It is certified that the question of jurisdiction referred to in the opinion was PASSED UPON—but that the case was also DETERMINED UPON ITS MERITS. The question of jurisdiction set forth in the opinion filed herein TOGETHER WITH THE QUESTION OF THE MERITS OF THE CASE is hereby certified to the Supreme Court." * * * (P. 21).

Had appellants brought this appeal on the record and without a certificate no *single, precise, specific, definite, controlling* question of jurisdiction would have been presented. Had they applied here for a writ directing the trial court to grant a certificate would their application have been granted, in view of the decisions of this court hereinafter cited?

The Certificate Contains Matters Other than Questions of Jurisdiction.

The so-called certificate does not contain a single, definite, clear, specific question of jurisdiction.

It is so broad as to require a search of the record by this court to ascertain what particular question of jurisdiction was involved.

This Court will not make such a search, nor follow counsel in such a search.

If this court will make such a search no particular, specific and definite question of jurisdiction will be found.

No mere suggestion that the jurisdiction of the court was in issue will answer.

Proceedings to this court were here dismissed for lack of a proper presentation of a single, precise, specific question of jurisdiction in the following cases and

they are favorably decisive of all the above contentions.

Maynard v. Hecht, 151 U. S. 324.

Moran v. Hagerman, 151 U. S. 329.

In re Lehigh Co., 156 U. S. 322.

Sheilds v. Colman, 157 U. S. 168.

Interior Construction Co. v. Gibney, 160 U. S. 217.

Van Wagenen v. Sewall, 160 U. S. 369.

Chappell v. U. S. 160 U. S. 499.

Davis v. Geissler, 162 U. S. 290.

Huntington v. Laidly, 176 U. S. 668-676.

The first point made in the brief of appellants is that "the Circuit Court erred in holding that the jurisdictional facts as to the complainants' citizenship were not properly alleged."

If such a question arose on the trial it is not properly presented in this court.

However, if a search of the record be made, it will be found that no such question was the REAL and SUBSTANTIAL GROUND of the decree and the assignment for that reason should not be considered.

If, however, the assignment be considered it may be observed that the jurisdictional facts as to the ALIENAGE of complainants and their alleged partnership are not properly pleaded.

Stuart v. Easton, 156 U. S. 46.

The second point made in the brief of appellants that "The court erred in holding that it was incumbent upon the complainants to prove the allega-

tion of citizenship," like the first point, is not properly presented for determination by this court. It does not appear that the point was of *controlling* force in the trial court and should not be considered. But if considered it will be found untenable, for the reason that, under the Code of Nebraska, the answer takes the place of all pleas, whether general or special, in abatement or to the merits and the general denial of appellee's answer put in issue appellants' jurisdictional averments. *Roberts v. Lewis*, 144 U. S. 653, arose in the Circuit Court of the United States for Nebraska and is directly in point. In that case the point was not argued by counsel in this court but Mr. Justice Gray speaking for the court said: "But a preliminary question to be decided is whether the Circuit Court of the United States appears upon this record to have had any juris diction of the case." Proceeding to a consideration of the question the court said: "The necessary consequence is that the allegations of citizenship of the parties, being a material allegation properly made in the petition was put in issue by the answer, and, like other affirmative and material allegations made by the plaintiff and denied by the defendant must be *proved by the plaintiff*. THE RECORD SHOWING NO PROOF or finding upon this ESSENTIAL POINT on which the JURISDICTION OF THE CIRCUIT COURT DEPENDED, the judgment must be reversed, with costs, for WANT OF JURISDICTION IN THE CIRCUIT COURT."

The statement in appellants' brief that "in order to justify the action of the trial court in dismissing the bill it must appear from the record that the suit did not involve a controversy of which the court could properly take cognizance," is not an accurate statement of the law in view of the opinion in the last cited

case. More accurately stated it would seem that jurisdiction in the Circuit Court will not be presumed but must affirmatively appear.

The third assignment of error in appellants' brief that the Court erred in passing upon the merits of the case is not within the field of this appeal. It does not involve any question touching the jurisdiction of the Circuit Court. The assignment is one not contemplated by the act granting the right of appeal from Circuit Courts direct to this court.

The Evidence Before the Trial Court is not Preserved in Proper Form and is not Before This Court in any Form.

The statement in appellants' brief that no evidence was introduced by defendants on various points on the trial is not true in point of fact; but as appellants have not preserved the evidence this court is precluded from an intelligent investigation of the question. What purports to be a deposition is printed in the record but as there is nothing to show that it, or the Commission, or the Notice under which it was taken was before the court for any purpose, during the trial, no statement found therein can be made the foundation of a decision in this court either upon the merits or upon any question of jurisdiction. This court is therefore unable to review the decree complained against.

The Errors, if any, were Without Prejudice.

Not only does it not appear that the trial court refused to hear appellants or denied them any rights because of any opinion it might have entertained touch-

ing jurisdictional questions; on the contrary, it affirmatively appears that the oral testimony, documentary evidence and argument of counsel offered by the appellants were all fully received, heard and determined Appellants were seeking a decree on the merits which was accorded them. It is difficult to see how rulings on jurisdictional questions were prejudicial to their rights.

The Decree Rests Upon an Independent Ground, Broad Enough to Maintain it, in Which no Question of Jurisdiction Was Involved.

The decree is grounded upon the merits of the cause. The evidence is not before this court. The opinion not being properly authenticated is no part of the record. No complaint is made that on the evidence the bill should not have been dismissed. The merits of the controversy appearing to have been fully heard and determined against the appellants the decree therefore rests upon questions of fact and principles of law independent of and not involving a determination of jurisdictional questions.

Respectfully submitted,

CHARLES F. TUTTLE,

Counsel for Appellee.